90-578

No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ALTA VERDE INDUSTRIES, INC., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL COURT

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QUESTION PRESENTED

Whether the U.S. Claims Court has jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1), and the Commodity Credit Corporation Charter Act, 15 U.S.C. § 714b(c), to award money damages to beef cattle producers for revenue losses they sustained as a result of the U.S. Department of Agriculture's implementation of the Dairy Termination Program in the Food Security Act of 1985, 7 U.S.C. § 1446, when:

(a) the USDA violated specific requirements of the Act which Congress expressly intended to prevent the very revenue losses which in fact occurred;

(b) the Act mandated the USDA to expend funds for additional beef purchases to absorb the excess quantities of beef coming to market as a result of the Dairy Termination Program, but the USDA's own unlawful actions enabled the United States to purchase that additional beef (as well as to make normal beef purchases) at depressed prices; and

(c) the Dairy Termination Program, as implemented by USDA, saved billions of dollars in federal milk subsidies while causing grave economic harm to beef cattle producers and contravening the expressed intentions of Congress.

PARTIES BELOW

Plaintiffs-Appellants:

Alta Verde Industries, Inc., Mike Basham, Innis Croft, Glenn Devine, Eidel Ranch, Inc., Donald E. Franz, Jr., Robert Garamendi, Godfather Ranchs, Inc., Patrick K. Goggins, George W. Gower, Robert G. Husband, Lawrence T. Johnson, Met Johnson, KLM Cattle Company, Los Cedros, Douglas G. Mahon III, Metro National Corporation, Joseph H. Russell, Ronald Saccani, Richard Schwartzbard, James Mark Smith, Sparrowk Livestock, Jack Suits, Wm. Barrett Travis, David Wanjura, and G. Dale Whittington, individually and on behalf of all others similarly situated

Defendant-Appellee:

United States of America

NOTE: Pursuant to Rule 29.1, the named corporate petitioners state that they do not have any parent or subsidiary companies.

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OPINIONS BELOW

The United States Court of Appeals for the Federal Circuit affirmed the judgment of the United States Claims Court without opinion. *Alta Verde Indus., Inc. v. United States*, 907 F.2d 158 (Fed. Cir. 1990) (App. 1a).

The opinion of the United States Claims Court granting the defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction is reported as *Alta Verde Indus., Inc. v. United States*, 18 Cl. Ct. 595 (1989) (App. 3a).

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on June 8, 1990 (App. 1a). Timely Petition for Rehearing was filed, and

was denied on July 6, 1990 (App. 20a). This Court has jurisdiction under 28 U.S.C. § 1254(1) (1988).

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. § 1491(a)(1) (1988) (App. 22a).
7 U.S.C. § 1446(d)(3) (1988) (App. 22a).
7 U.S.C. § 1446, note (1988) (App. 25a).
7 C.F.R. §§ 1430.450, .456-.458 (App. 27a).

STATEMENT OF THE CASE

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Federal Circuit, which affirmed the United States Claims Court's dismissal of their claims for lack of subject matter jurisdiction.

Petitioners here contend that the Claims Court has jurisdiction over their claims under the Tucker Act, 28 U.S.C. § 1491(a)(1) (1988), the claims being founded upon an Act of Congres within the clear meaning of the Tucker Act (App. 22a). The Commodity Credit Corporation Charter Act, as amended, 15 U.S.C. § 714b(c), extends the Tucker Act to claims against the Corporation.

A. Nature of the Case

This case concerns the question of whether beef cattle producers have a monetary remedy in the U.S. Claims Court when an agency of the United States Government, the Department of Agriculture ("USDA"), flagrantly disregarded economic protections mandated by Congress while implementing a program that saved billions of dollars for the federal treasury.

In 1986, a federal district court in Texas found that USDA violated statutory beef producer protection provisions when it implemented the Dairy Termination Program in March of that year. A Congressional committee later reached the same conclusion. By "front-end loading" the slaughter of dairy cows, USDA caused precisely

the same type of harm to beef producers which Congress intended to prevent: a panic in beef markets and a sharp decline in prices. The district court granted injunctive relief a month after USDA announced the details of its implementation, but that relief did not prevent ranchers and other beef producers from losing tens of millions of dollars on their cattle sales before the markets stabilized again.

This is not a case where a federal regulatory program to safeguard the public safety and welfare caused unavoidable collateral harm to some segment of the diverse national economy. Nor is it a case where Congress has chosen to authorize executive action without providing safeguards against the potential economic harm that otherwise would be expected to occur. Rather, this case involves a program directed at reducing massive federal subsidies to one segment of the economy, the dairy industry, while avoiding unnecessary harm to another segment, the beef cattle industry. Members of Congress foresaw the harm that would be caused to beef cattle markets by uncontrolled liquidation of dairy herds, promised their beef producer constituents that it would be minimized, and gave the USDA specific directions to accomplish that additional purpose of the legislation. Congress also authorized USDA to expend federal funds in support of that purpose, for purchasing additional beef to help offset the influx of dairy cow meat.

But instead of minimizing the harm, USDA's unlawful actions maximized the adverse impact on beef producers. As a result, the savings in federal dairy subsidies were accelerated, and USDA's beef purchases were made at depressed prices. In these circumstances, compensating beef producers for their losses will not open the floodgates to spurious claims arising from the vast scope of federal regulatory activities, but would instead require the United States to disgorge only a small portion of the economic benefit which it has already obtained by reason of the USDA's unlawful conduct. Indeed,

apart from rendering justice in this case, recognition of the beef producers' compensation claims would deter the type of bureaucratic disregard for statutory duties that tends to spawn such claims in the first place.

Nevertheless, the courts below have declined even to hear the merits of beef producers' statutory claims under the jurisdiction granted by the Tucker Act of 1887. The jurisdictional holding of the lower courts in this case all but emasculates the Tucker Act as applied to statutory claims. In the context of that important class of claims, the Claims Court judge and the Court of Appeals have rendered the Tucker Act a nullity in much the same sense that, in the view of at least three Justices of this honorable Court, the same lower courts have rendered the Back Pay Act a nullity. *Hambsch v. United States*, 857 F.2d 763 (Fed. Cir. 1989), *cert. denied*, 109 S. Ct. 1969, 1971 (1989) (O'Connor, J., dissenting).

The petitioners respectfully request this Court to review the lower courts' holdings that they lack jurisdiction to adjudicate the beef producers' claims.

B. Course of Proceedings

The petitioners in this case, twenty-six beef cattle producers from twelve states, filed their class action complaint in the U.S. Claims Court on January 4, 1988.[1] The complaint specified three causes of action for monetary relief against the United States under the Tucker Act, 28 U.S.C. § 1491(a)(1) (1988): (1) for money damages based on the USDA's failure to confer upon beef cattle producers the economic protections mandated by Congress in the Food Security Act; (2) for just compensation under the takings clause of the Fifth Amend-

[1] The complaint described the plaintiff class as "[a]ll persons who sold cattle in the United States during the period March 28, 1986, through September 30, 1986[.]" Complaint ¶ 3.1. The Claims Court never ruled on the plaintiffs' motion for class certification, which was filed with the complaint pursuant to RUSCC 23.

ment of the United States Constitution; and (3) for restitution of the amounts saved by the government at beef producers' expense as a result of USDA's unlawful implementation of the Act.

On January 19, 1988, the respondent United States moved to dismiss the complaint for lack of subject matter jurisdiction under RUSCC 12(b)(1). During briefing on its motion, the United States did not submit any evidence contradicting the jurisdictional facts alleged and documented by the plaintiffs.[2]

Almost two years later, on November 15, 1989, the Claims Court dismissed the complaint for lack of subject matter jurisdiction. *Alta Verde Industries, Inc. v. United States*, 18 Cl. Ct. 595 (1989); App. 3a. For purposes of its decision, the court was constrained to accept the facts alleged by the plaintiffs. *Id.* at 598 (App. 8a).

Following oral argument, The U.S. Court of Appeals for the Federal Circuit affirmed on June 8, 1990 (App. 1a). Pursuant to Fed. Cir. R. 36, however, the panel deemed it unnecessary to write an opinion, and subsequently denied the appellants' petition for rehearing and suggestion for rehearing in banc. Thus, references in this petition to the legal errors in the jurisdictional analysis of the courts below are limited, by necessity, to the opinion of the Claims Court.

The petitioners here do not seek the Court's review of the jurisdictional issues related to their alternate Fifth Amendment taking and unjust enrichment claims (al-

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[2] The United States has not filed an answer in this case. The only factual record before the Claims Court consisted of the plaintiffs' exhibits in support of its motions for class certification and partial summary judgment: (1) materials from the district court action in *Shelton v. USDA*, No. CA-5-86-81 (N.D. Tex. 1986), and (2) copies of the 1986 hearings and report by the House Government Operations Committee. As explained elsewhere in this petition, these materials fully document USDA's statutory violations upon which the petitioners base their claims.

though the latter overlap the statutory claims). Rather, they seek this Court's recognition that their primary claim, founded upon the Food Security Act of 1985, properly states a cause of action for money damages under the Claims Court's Tucker Act jurisdiction.

C. Statement of Facts

Congress enacted the Dairy Termination Program ("DTP") as Section 101(b) of the Food Security Act of 1985, 7 U.S.C. § 1446(d)(3) (1988) (App. 22a). The DTP was Congress' response to an alarming growth in federal dairy industry subsidies, which reached $2.6 billion in the 1983 fiscal year. H.R. Rep. No. 271 (Part I), 99th Cong., 1st Sess. 16, *reprinted in* 1985 U.S. Code Cong. & Ad. News 1103, 1120.

In the DTP legislation, Congress authorized the U.S. Department of Agriculture ("USDA") to pay milk producers to liquidate their entire herds of dairy cattle. 7 U.S.C. § 1446(d)(3)(A). The amounts of federal payments and the timing of the liquidations were to be determined by contract bids submitted by individual milk producers to the Commodity Credit Corporation ("CCC").[3] *Id.*; 7 C.F.R. § 1430.450. Under the CCC contracts, successful bidders agreed to sell their entire dairy herds for slaughter or export, and to stay out of the dairy business for at least five years. *Id.*; *Alta Verde*, 18 Cl. Ct. at 596 (App. 4a).

From the beginning of its deliberations on the 1985 farm bill, Congress recognized that the prospect of large supplies of dairy cow meat from the DTP slaughter could disrupt the unregulated markets in which beef producers

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[3] The Commodity Credit Corporation is a wholly-owned government corporation chartered in 1948 for the purposes of stabilizing farm prices and supplies of agricultural commodities. 15 U.S.C. § 714. It is an "agency and instrumentality" of the United States within the Department of Agriculture, and subject to the supervision of the Secretary of Agriculture. *Id.*

sell their cattle, and promised to protect beef producers from such adverse impacts. *Alta Verde*, 18 Cl. Ct. at 596. At a 1985 public hearing on the DTP in Sioux Falls, South Dakota, members of the House Livestock, Dairy and Poultry Subcommittee reassured livestock growers that the DTP legislation would include provisions for government meat purchases and orderly marketing of slaughtered dairy cattle. H.R. Rep. No. 271, 99th Cong., 1st Sess. 358, *reprinted in* 1985 U.S. Code Cong. & Ad. News at 1462. Later that year, the House-Senate conferees consulted with the National Cattlemen's Association before acceding to USDA's request to include more flexibility in the orderly marketing provisions. *Implementation of the Dairy Termination Program: USDA Slaughter of the Cattle Market*, H.R. Rep. No. 890, 99th Cong., 2d Sess. 5 (1986).

In their final form, the orderly marketing provisions in Section 101(b) of the Food Security Act directed the USDA to "by regulation specify marketing procedures" incorporating specific statutory guidelines for timing the dairy cow slaughter. 7 U.S.C. § 1446(d)(3)(A)(iii) (App. 22a). First, Congress instructed USDA to ensure that greater numbers of dairy cattle would be slaughtered in the first and last periods of the 18-month program than in the middle six-month disposal period. *Id.* USDA's regulations were also to ensure that dairy cattle slaughters would conform to seasonal marketing patterns, and that DTP slaughters in excess of normal dairy herd culling rates would be limited to 7 percent of the national dairy herd per calendar year. *Id.*

Apart from these orderly marketing provisions, Section 104 of the Food Security Act directed the USDA to purchase 400 million pounds of red meat (beef, pork and lamb) in addition to the Government's normal meat purchases. 7 U.S.C. § 1446 note pp. 671-72 (App. 25a). Finally, in more general but by no means uncertain terms, Congress directed USDA to "take all feasible steps" to

minimize the DTP's adverse effects on beef producers. 7 U.S.C. § 1446(d) (3) (C).

Thus, Congress foresaw the potential harm to the beef cattle industry that could result from uncontrolled liquidation of dairy herds under the DTP, and enacted explicit safeguards to prevent that harm from occurring. What Congress did not foresee was the prospect that the executive branch would violate those safeguards. Congress assumed that the USDA would obey the law. Consequently, the DTP legislation contains no special remedies for USDA violations of the beef producer protection provisions.

The Food Security Act became law on December 23, 1985. USDA published its regulations implementing the DTP on March 7, 1986. 51 Fed. Reg. 7915; 7 C.F.R. §§ 1430.450-.469 (App. 27a).

On Good Friday, March 28, 1986, the USDA announced its DTP bid acceptances covering the slaughter of 1.55 million dairy cows, heifers, and calves. Most significantly, USDA had given heavy preference to bids submitted for the first disposal period. USDA, *Accepting DTP Bids*, Notice LD-257 (March 28, 1986). As reflected in the cattle markets' reaction, and documented in subsequent district court and Congressional committee findings, the USDA's implementation of the DTP ignored statutory requirements, causing the very same type of economic harm to beef producers as Congress intended to prevent.

Cattle prices plummeted immediately when the commodity markets opened after the Easter weekend. *USDA's Mishandling of Dairy Buy-Out Program: Hearings Before Subcomm. on Government Information, Justice and Agriculture of the House Comm. on Government Operations*, 99th Cong., 2d Sess. 7 (Susan B. Phillips, Chairman, Commodity Futures Trading Commission) (May 20, 1986) (hereinafter, the "DTP Hearings"); *Alta Verde*, 18 Cl. Ct. at 596. Cash prices for live cattle dropped precipitously in very light trading, and many

Chicago futures prices closed limit-down several days during the week. *Id.* Although the record on actual losses sustained by the plaintiff class has not yet been developed in this case, the National Cattlemen's Association has estimated that beef producers lost $25 million per week on cash sales throughout the month of April. DTP Hearings at 182 (Testimony of J. Burton Eller). This contrasts with a savings to the federal treasury of $2.4 billion, as explained below.

On April 8, 1986, several livestock growers and associations filed a complaint in the Northern District of Texas, seeking declaratory and injunctive relief against USDA based on its violations of the statutory provisions intended to protect beef producers from the type of market collapse which in fact occurred following USDA's March 28 announcement. *Shelton v. United States Department of Agriculture*, Civ. No. CA-5-86-81 (N.D. Tex.). None of the parties plaintiff in the *Shelton* case is among the named plaintiffs in the instant case, and the *Shelton* complaint did not seek damages from the United States.

The *Shelton* court's preliminary findings and opinion, issued on April 30, 1989, fully document the nature of USDA's violations of the DTP's beef producer protective provisions, and the resultant harm to the plaintiff class in this case. Complaint ¶ 6.01. The *Shelton* court found that the regulations previously issued by USDA were devoid of any meaningful orderly marketing procedures that could be characterized as taking all feasible steps to minimize the adverse impact on beef producers. Slip op. at 6 (April 30, 1986) (memorandum opinion). USDA's regulations and subsequent announcements also allowed an extreme "bunching" of dairy cattle slaughters in the first five-month period of the DTP, on the order of 80-90% of the dairy cattle to be slaughtered during the entire 18-month life of the program. Slip op. at 6. Furthermore, according to the *Shelton* court, flooding the market with 80-90% of the total dairy cattle slaughter in the

first five months of the program most probably violated Congress' instructions to limit the slaughter to 7% of the national dairy herd per calendar year. Slip op. at 6.

The *Shelton* court concluded that the effects of USDA's actions in implementing the DTP "have been to *maximize the adverse impact* rather than to minimize it as shown by the drastic drop in the cattle market after announcements indicated that there would be a 'bunching' of dairy cattle for slaughter in the first period." Slip op. at 9 (emphasis added). On April 30, 1986, the district court issued a preliminary injunction ordering USDA to promulgate new regulations specifying orderly marketing procedures consistent with Congress' mandate in the Food Security Act. *Shelton*, No. CA-5-86-81 (N.D. Tex. April 30, 1986) (order granting preliminary injunction). However, the parties reached a settlement in May, with the USDA agreeing to solicit requests from milk producers to change their contracts from the first disposal period to a later period, and the case was dismissed on May 19, 1986. *See* DTP Hearings at 114 (July 16, 1986) (Testimony of Under Secretary Amstutz).

Later in 1986, after conducting a series of hearings, the House Committee on Government Operations came to similar conclusions about USDA's mishandling of the DTP implementation. *Implementation of the Dairy Termination Program: USDA Slaughter of the Cattle Market*, H.R. Rep. No. 890, 99th Cong., 2d Sess. (1986); Complaint ¶ 6.02. Among its findings, the Committee's report states that USDA "ignored specific statutory requirements . . . that a regulation be issued to specify the marketing pattern of dairy cattle and that the regulation be based on estimates derived from statistics of dairy and beef cattle slaughter." *Id.* at 2. Furthermore, by ignoring the explanatory instructions in the legislative history of the Food Security Act, USDA "subverted the intent of the law[.]" *Id.* The House Government Operations Committee concluded:

> The failure of the Department to implement the law fully caused irreparable economic damage to the cattle industry despite careful deliberations by the Congress to alleviate such damage to the maximum possible extent.

Id. at 2.

There can be little question (particularly for purposes of jurisdiction) that the USDA violated the orderly marketing provisions in Section 101(b) of the Food Security Act, which embodied the first part of Congress' covenant to protect cattle producers. With respect to the second part of Congress' covenant under the Act, and compounding the market panic caused by USDA's March 28 announcement, USDA's purchases of additional red meat failed to keep pace with actual slaughters in the first month of the program. USDA's own statistics show that while 17% of the total DTP cattle were actually slaughtered by April 26, 1986, USDA's extra meat purchases during the same period barely reached 5% of the 400-million-pound total mandated in Section 104 of the Act. *USDA News* (July 9, 1986) (DTP Hearings at 124-25).

Although the DTP, as implemented by USDA, devastated beef cattle producers, it was a boon for the dairy industry and for the federal treasury. The General Accounting Office estimates that the CCC's incentive payments to participating milk producers totaled $1.53 bilion, less than half of which came from assessments paid by other milk producers. *Dairy Termination Program: An Estimate of its Impact and Cost-Effectiveness*, GAO/RECD-89-96 at 7 (1989).[4] The $390 million spent on additional meat purchases pales by comparison, but this cost (along with other normal government beef purchase costs) would undoubtedly have been higher if USDA had not caused an abrupt decline in beef prices. *Id.*; Com-

[4] The GAO's estimates are expressed in 1986 dollars, using an 8.4 percent discount rate. *Dairy Termination Program, supra*, at 7, App. I.

plaint ¶ 6. All told, after deducting all these costs, the DTP will have saved the United States Government $2.4 billion in milk producer subsidies through 1990. GAO, *supra*, at 7.

ARGUMENT

With this petition, the plaintiff beef producers seek the Court's review of whether their claims properly fall within the jurisdiction granted the U.S. Claims Court under the Tucker Act of 1887 (as amended), as claims founded upon an Act of Congress. The Tucker Act provides in relevant part as follows:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or . . . for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (1988) (App. 22a).

In *Eastport Steamship Corp. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967), the Court of Claims developed an enduring framework for analyzing statutory claims under the Tucker Act. *Eastport Steamship* has long served as the starting point for this Court's analysis of Tucker Act claims. *See, e.g., United States v. Testan*, 424 U.S. 392, 400 (1976); *United States v. Mitchell*, 463 U.S. 206, 217 (1983) ("*Mitchell II*"); and *Bowen v. Massachusetts*, 487 U.S. 879, ——, 108 S. Ct. 2722, 2738 n.42 (1988).

In all cases brought under the Tucker Act, "[t]he claim must, of course, be for money." *Eastport Steamship*, 372 F.2d at 1007; *Mitchell II*, 463 U.S. at 216. In this case, the beef producers' claims are strictly monetary in nature. They seek to recover the lost revenues on their cattle sales which resulted from the USDA's violations of the Food Security Act or, as alternative partial relief, restitution for the amounts saved by the United

States as a result of USDA's unlawful conduct. Complaint ¶¶ 10.1 and 10.2.

The Tucker Act, however, "does not create any substantive right enforceable against the United States for money damages." *Testan*, 424 U.S. at 398. Rather, a substantive right to monetary relief must be found in some other source of law, such as an Act of Congress. *Mitchell II*, 463 U.S. at 216. In this case, the Act of Congress upon which the petitioners rely is the Food Security Act of 1985, 7 U.S.C. § 1446(d)(3) and note at pp. 671-72 (1988).

The statute upon which Tucker Act claimants rely must be one which " 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " *Testan*, 424 U.S. at 400, *quoting Eastport Steamship*, 372 F.2d at 1009. The statute may grant the right to recover money "either 'expressly or by implication.' " *Mitchell II*, 463 U.S. at 217 n.16, *quoting Eastport Steamship*, 372 F.2d at 1007. In other words, " 'a claimant who says he is entitled to money from the United States because a statute . . . grants him that right, in terms or by implication, can properly come to the Court of Claims, at least if his claim is not frivolous but arguable.' " *Eastport Steamship*, 372 F.2d at 1008, *quoting Ralston Steel Corp. v. United States*, 340 F.2d 663 (Ct. Cl. 1965), *cert. denied*, 381 U.S. 950 (1965).

Admittedly, the petitioners here cannot point to language in the Food Security Act that expressly grants beef producers the right to sue the United States if the USDA ignores its statutory duties under the Act. Nor is there any indication in the Act's legislative history that Congress ever gave active consideration to what recourse beef producers might have if the executive branch disobeyed the orderly marketing provisions that USDA itself was involved in developing. It is not, however, reasonable for the courts to require Congress to anticipate and provide for such an unlikely eventuality in every piece

of legislation creating or governing executive programs. To the contrary, that is the sole purpose of the Tucker Act. Under the circumstances of this case, the CCC's charter, 7 U.S.C. § 714b(c), provides an additional express consent to suit under the Claims Court's Tucker Act jurisdiction.

The Court long ago recognized that the Tucker Act itself provides the consent necessary for a cause of action when the United States unlawfully withholds economic benefits to which a claimant is entitled by statute. *United States v. Wickersham*, 201 U.S. 390 (1906) (Interior Department employee entitled to back pay for period of unlawful separation). More recently, however, members of this Court (along with the Solicitor General) have criticized the Federal Circuit's excessively narrow view of Claims Court jurisdiction over statutory back pay claims, even after the enactment of the Back Pay Act, 5 U.S.C. § 5596. *Hambsch v. United States*, 109 S. Ct. 1969, 1971 (1989) (O'Connor J., dissenting from denial of certiorari). As in *Hambsch*, the jurisdictional holdings of the courts below in this case have the effect of rendering the Tucker Act a nullity.

As explained in the remainder of this petition, the duties set forth in the Food Security Act, the context and legislative history of that Act, the nature of USDA's violations, and the resultant economic harm, when taken together and viewed in light of applicable case law, unquestionably support the inference that beef producers are entitled to monetary relief under the Tucker Act.

I. THE USDA BREACHED ITS STATUTORY FIDUCIARY DUTY TO CONFER ECONOMIC PROTECTIONS UPON BEEF PRODUCERS.

Perhaps the most prominent example of a class action Tucker Act claim implied by statute is found in *Mitchell II*, 463 U.S. 206 (1983). The statutory rights and obligations recognized in *Mitchell II* are closely analogous to the instant case.

In *Mitchell II*, a divided Court held that a comprehensive framework of federal statutes and regulations created a fiduciary obligation on the part of a federal agency, the Bureau of Indian Affairs, to prudently manage timber resources on allotted lands within the Quinault Reservation. *Id.* at 225. When the BIA systematically breached its statutory fiduciary duties, the Court recognized the Quinault allottees' remedy under the Tucker Act to obtain compensation for the resulting economic harm they sustained. *Id.* at 228.

In the instant case, Congress gave express assurances to beef producers that it would protect them from adverse economic effects of the DTP. Congress charged the USDA with the exclusive responsibility for carrying out its promises to beef producers, and the USDA had complete control over the implementation of the DTP. And like the BIA in *Mitchell II*, USDA callously breached its statutory fiduciary obligations. By failing to provide for the orderly marketing of slaughtered dairy cattle in accordance with Congress' detailed instructions, the USDA caused precisely the same type of economic harm to the beneficiaries of its trust responsibilities as Congress intended to prevent.

II. THE UNITED STATES DERIVED SUBSTANTIAL ECONOMIC GAIN FROM USDA'S BREACH.

There is a significant difference between *Mitchell II* and the present case. In *Mitchell II*, there is no indication that the BIA derived any benefit by ignoring its fiduciary obligations. In the present case, however, USDA's bunching of the DTP slaughter early in the program reduced milk supplies quicker than Congress intended, thus increasing the savings in federal dairy subsidies resulting from the DTP. H.R. Rep. No. 890, 99th Cong., 2d Sess. at 18.

Moreover, by causing a precipitous decline in cattle prices, USDA was undoubtedly able to make the beef pur-

chases mandated in Section 104 at lower prices. *Id.*; Complaint ¶ 9.02. Indeed, during the period of depressed beef prices, the federal government also presumably saved money on its normal, ongoing beef purchases. Complaint ¶ 9.01. In this respect, this is a case where " 'the Government has the citizen's money in its pocket' and the claim is 'to recover an illegal exaction made by officials of the Government, which exaction is based on a power supposedly conferred by a statute[.]' " *Eastport Steamship*, 372 F.2d at 1008, *quoting Clapp v. United States*, 117 F.Supp. 576 (Ct. Cl. 1954), *cert. denied*, 348 U.S. 834.

At the very least, beef producers in this case are entitled to recover the economic benefits which unlawfully accrued to the United States at their direct expense.

III. THESE CLAIMS ARISE IN THE CONTEXT OF A STATUTORY SCHEME OF MANDATORY ECONOMIC ENTITLEMENTS THAT HAS PREVIOUSLY BEEN HELD TO IMPLY A TUCKER ACT CAUSE OF ACTION.

In *Eastport Steamship*, the claimant (after recovering the sums unlawfully exacted by government officials) was denied additional compensation for profits lost on the potential sale of a World War II German merchant vessel that was held up by the necessity for obtaining permission of the Maritime Commission under the Shipping Act, 46 U.S.C. §§ 808 and 835 (1946). In those circumstances, the Court of Claims was unwilling to "break entirely new and treacherous ground" by inferring a right to compensation. *Eastport Steamship*, 372 F.2d at 1009. The court was concerned, because "we would necessarily have to open the doors to similar claims by other applicants who suffer commercial damage from a wrongful denial of a license or permission" arising from the "mass of other regulatory and prohibitory activities of the Federal Government[.]" *Eastport Steamship*, 372 F.2d at 1009-1010.

In contrast, the beef producers' losses in this case did not occur as an incidental, unavoidable result of federal regulatory or prohibitory activities in the beef cattle industry. Rather, they arise in the context of legislation which Congress intended to reduce the level of subsidies to the dairy industry, while protecting beef producers from collateral economic harm. The losses that the plaintiffs have suffered were expressly intended by Congress not to occur, and would not have occurred if the USDA had obeyed the dictates of Congress. To recognize the Claims Court's jurisdiction over petitioners' claims in this case will not "open the door" to a flood of claims arising from the federal government's vast regulatory activities. It will be a rare case, one hopes, where the executive branch violates Congressional mandates which are as clear and purposeful as those violated in this case, but in all such cases our system of justice demands that there be a remedy. The Tucker Act provides that remedy.

The Federal Circuit itself has recognized that statutory programs similar to the DTP give rise to cognizable Tucker Act claims when the USDA ignores its obligations. In *Grav v. United States*, 886 F.2d 1305 (Fed. Cir. 1989), milk producers brought suit against the United States because the USDA refused to pay them for slaughtering their dairy cattle under the Milk Diversion Program, 7 U.S.C. § 1446(d)(3)(A) (Supp. I 1983). The Milk Diversion Program was the predecessor to the DTP, and was replaced in the Code by the DTP pursuant to the amendments made by the Food Security Act of 1985.

The *Grav* court's analysis turned on whether USDA had discretion to refuse participation by qualified applicants. *Grav*, 886 F.2d at 1307. The court concluded that the statutory language and legislative history supported an interpretation that the Milk Diversion Program was mandatory. *Id.* at 1308. Affirming the Claims Court's award, the *Grav* court held that "this is a money man-

dating statute that triggers Tucker Act jurisdiction in the Claims Court." *Id.* at 1307.[5]

Likewise in the DTP, Congress clearly imposed mandatory requirements on USDA to protect beef producers from adverse effects of the dairy cow slaughter:

> [T]he Secretary *shall* . . . by regulation specify marketing procedures . . . Such procedures also *shall* ensure that such sales of dairy cattle for slaughter *shall* occur on a basis . . . that maintains historical seasonal marketing patterns. [T]he Secretary *shall* limit the total number of dairy cattle marketed for slaughter . . . to no more than 7 percent of the national dairy herd per calendar year.

7 U.S.C. § 1446(d)(3)(A)(iii) (emphasis added). As in *Grav*, the Secretary lacked discretion to deny the rights granted to beef producers under the DTP, and as in *Grav*, the Secretary abused his authority by failing to confer those mandatory protections on beef producers. It is incongruous and unconscionable for the courts below to deny beef producers the same right to monetary relief under the Tucker Act as has been granted to dairy industry claims arising from the same statutory context.

The beef producer protections in the Food Security Act were not limited to restricting the USDA's discretion on the timing of dairy cattle slaughters. Section 104 of the Act affirmatively required the USDA to expend federal money to offset adverse impacts by purchasing 400 million pounds of red meat. 7 U.S.C. § 1446 note (App. 25a). This "money mandating" feature of the Act further supports an extension of the *Grav* holding to this case, and further distinguishes the substantive law upon which beef producers rely from the type of regulatory statute at issue in *Eastport Steamship*.

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[5] The Claims Court in this case erroneously distinguished the *Grav* holding as based solely on an implied-in-fact contract. *Alta Verde*, 18 Cl. Ct. at 600 n.3.

IV. THE CCC CHARTER ACT EXPRESSES CONGRESS' PREFERENCE FOR MONETARY RATHER THAN INJUNCTIVE RELIEF.

As the Claims Court observed, "Congress directed the USDA to carry out the DTP through the Commodity Credit Corporation. 7 U.S.C. § 1446(d)(7)." *Alta Verde*, 18 Cl. Ct. at 596 n.1. Under the DTP regulations, milk producers submitted their bids for incentive payments to the CCC. 7 C.F.R. §§ 1430.450, .456. Thus, it was the CCC's acceptances of those bids that was the subject of USDA's March 28, 1986 announcement which triggered the panic in the cattle markets.

Under the CCC's charter, Congress has expressly authorized the CCC to "sue and be sued," and has prohibited injunctive relief against it. 15 U.S.C. § 714b(c). Congress has also expressly authorized Tucker Act claims in the Claims Court in suits where, as in this case, the United States is the real party in interest. 15 U.S.C. § 714b(c)(1). In the statutory framework from which the beef producers' claims arise, this is the only place where Congress has addressed the question of remedies, and its preference for monetary rather than injunctive relief is clear and unequivocal.

In their complaint, the petitioners specifically invoked 15 U.S.C. § 714b(c) in support of their allegations of jurisdiction and waiver of sovereign immunity. Complaint ¶ 2. Nevertheless, despite this express anti-injunction provision and waiver for Tucker Act claims, the Claims Court instead held that Congress "did provide a remedy in the form of an injunction[.]" *Alta Verde*, 18 Cl. Ct. at 600.

In the earlier DTP litigation, the USDA argued forcefully that 15 U.S.C. § 714b(c) barred the type of injunctive relief requested by the livestock growers' associations. *See Shelton v. USDA*, Civ. No. CA-5-86-81, Slip op. at 3-4 (N.D. Tex. April 30, 1986) (memorandum opinion). However, in granting preliminary injunctive relief against

the USDA and its Secretary, the *Shelton* court noted that the CCC was not a named party in that case. *Id.* The preliminary relief granted by the *Shelton* court was limited to requiring the USDA to promulgate new regulations, and, unlike the instant case, did not involve any relief for harm suffered by beef producers as a result of previous actions by the CCC and the USDA.

Further briefing in this Court will demonstrate that the posture of this case is clearly distinguishable from that in *Shelton*, even assuming that the district court's holding on this question was not in error. And even if the CCC Charter Act is held not to be controlling in this case, it constitutes persuasive evidence of Congress' strong preference for monetary, rather than equitable, relief in the context of the petitioners' claims.

V. PRIOR INJUNCTIVE RELIEF DOES NOT BAR THE BEEF PRODUCERS' CLAIMS IN THIS CASE.

In concluding that Congress intended injunctive relief as an exclusive remedy in this case, the Claims Court also stated, erroneously: "Ironically, plaintiffs relied on the theory that they could not recover money damages to persuade the district court to grant equitable relief." *Alta Verde*, 18 Cl. Ct. at 600. This is simply not true.

In the first place, none of the named plaintiffs in the instant case was a party to the *Shelton* litigation, and the *Shelton* plaintiffs included only a handful of absent members of the class described in this case. *Shelton* was dismissed pursuant to the parties' stipulation. Individual beef producers across the country had no notice or opportunity to participate in that settlement, and it thus has no binding effect on these petitioners' claims. It is also dubious that the USDA vigorously advocated the position that equitable relief was barred by the availability of a money damages remedy against the United States.

Secondly, the irreparable harm which the *Shelton* court found as a prerequisite for granting injunctive relief was

not limited to lost revenues caused by the decline in beef prices. As Chief Judge Woodward stated:

> Estimates of damage to the time of the hearings in this court amount to $25 million dollars, but a *very greater damage* is shown by the loss in value of the inventory of the cattle producers which adversely affect the producers' right to borrow funds with which to operate. This additional effect could cause many millions of additional dollars of economic loss.

Shelton, Slip op. at 7 (emphasis added). In its subsequent hearings on the DTP implementation, members of Congress also heard about the irreparable harm suffered by beef producers beyond the simple revenue losses at issue in this case:

> I keep thinking about the farm family that I referred to in the last hearing, from Oklahoma. They are going to be out of business. There is no way that you can compensate them for the loss of their farm. They were counting on the livestock market, cattle that they had on wheat pasture, to offset the losses that they had in the grain markets and it was not simply the marketplace and the mix in the market that were responsible for their losses, it was the U.S. Government that brought their loss about.

DTP Hearings at 183 (Testimony of J. Burton Eller).

The petitioners in this case do not contend that these types of devastating consequential losses are recoverable under the Tucker Act. They only seek to recover the revenues they and other beef producers lost as a direct result of USDA's faulty DTP implementation, revenues which Congress expressly sought to protect. In the context of available remedies, the only relevance of the *Shelton* injunction is that it undoubtedly mitigated the beef producers' damages.

CONCLUSION

On behalf of beef cattle producers across the United States, the petitioners pray that the Court will grant their petition for a writ of certiorari, and on review, recognize their statutory claim for money damages under the Tucker Act.

Respectfully submitted,

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October —, 1990

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-5037

ALTA VERDE INDUSTRIES, INC., MIKE BASHAM; INNIS CROFT; GLENN DEVINE; EIDEL RANCH, INC.; DONALD E. FRANZ, JR.; ROBERT GARAMENDI; GODFATHER RANCHES, INC.; PATRICK K. GOGGINS; GEORGE W. GOWER; ROBERT G. HUSBAND; LAWRENCE T. JOHNSON; MET JOHNSON; KLM CATTLE COMPANY; LOS CEDROS; DOUGLAS G. MAHON, III; METRO NATIONAL CORPORATION; JOSEPH H. RUSSELL; RONALD SACCANI; RICHARD SCHWARTZBARD; JAMES MARK SMITH; SPARROWK LIVESTOCK COMPANY, INC.; JACK SUITS; WM. BARRETT TRAVIS; DAVID WANJURA, and DALE WHITTINGTON; individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

JUDGMENT

On Appeal from the United States Claims Court
in Case No(s). 2-88C

This CAUSE having been considered, it is

ORDERED and ADJUDGED:

Per Curiam (MARKEY, *Chief Judge*, MICHEL, *Circuit Judge*, and BREWSTER, *District Judge**):

AFFIRMED. *See* Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated Jun. 8, 1990

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* Judge Rudi M. Brewster of the Southern District of California, sitting by designation.

IN THE UNITED STATES CLAIMS COURT

No. 2-88 C

(Filed: November 15, 1989)

ALTA VERDE INDUSTRIES, INC., *et al.*,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

Jurisdiction, Tucker Act; Food Security Act of 1985; taking; fifth amendment; unjust enrichment.

Robert G. Mullendore, Missoula, Montana, for plaintiffs.

George M. Beasley, III, Washington, D.C., with whom were *David M. Cohen* and *Stuart Schiffer, Acting Assistant Attorney General*, for defendant.

OPINION

RADER *Judge.*

Alta Verde Industries (plaintiffs) claim to represent a class consisting of all ranchers who sold beef in the United States between March 28, 1986 and September 30, 1986. Plaintiffs contend that the United States Department of Agriculture (USDA) caused serious economic

harm to the beef industry by failing to comply with statutory requirements designed to protect meat prices during the Dairy Termination Program (DTP). Plaintiffs contend that USDA regulations did not protect meat prices as contemplated by the DTP. When these regulations issued, the beef futures market suffered an unprecedented collapse. This market collapse depressed the price of beef and reduced the value of plaintiffs' cattle. Plaintiffs seek compensatory damages under the Food Security Act of 1985 (the Act), the fifth amendment to the Constitution, and the doctrine of unjust enrichment.

Defendant moves to dismiss pursuant to RUSCC 12(b)(1) because the United States Claims Court lacks jurisdiction over plaintiffs' clams. Plaintiffs oppose the motion to dismiss and move instead for partial summary judgment.

After oral argument, this court grants defendant's motion to dismiss the complaint for lack of subject matter jurisdiction. Therefore this court need not address plaintiffs' cross-motion for partial summary judgment.

FACTS

In an effort to reduce federal dairy price support payments, Congress enacted the DTP in 1985. 7 U.S.C. § 1446(d)(3) (1988). To reduce over-production of milk, Congress permitted dairy farmers to enter into contracts with USDA. Under these contracts, the farmers agreed to dispose of their dairy cattle and not produce milk for at least five years. In exchange, USDA agreed to offer an incentive payment and also to allow the dairy farmers to retain the proceeds from the sale of cattle.

Congress recognized that the slaughter of dairy cattle could increase the supply of beef on the market and reduce beef prices. A decline in meat prices would affect beef, pork, lamb, and poultry producers. There-

fore, in addition to requiring the Secretary of USDA to "take all feasible steps to minimize" harm to beef producers, 7 U.S.C. § 1446(d)(3)(C), Congress included several provisions circumscribing USDA's implementation of the program.[1] Congress required USDA to:

> specify [by regulation] marketing procedures to ensure that greater numbers of dairy cattle slaughtered . . . shall be slaughtered in each of the periods of April through August 1986, and March through August 1987 than for the other months of the program. Such procedures also shall ensure that such sales of dairy cattle for slaughter shall occur on a basis estimated by the Secretary that maintains historical seasonal marketing patterns . . . the Secretary shall limit the total number of dairy cattle marketed for slaughter under the program in excess of the historical dairy herd culling rate to no more than 7 percent of the national dairy herd per calendar year.

7 U.S.C. § 1446(d)(3)(A)(iii)(II). Congress also instructed USDA to purchase and distribute 400,000,000 pounds of red meat in addition to those quantities normally purchased. 7 U.S.C. § 1446, note at pp. 671-72 (1988).

The 1985 Act thus required USDA to spread the slaughter of dairy cattle over a longer period of time. The Act specifically mentioned three time frames. The Act ensured slaughter of more cattle in the first (April-August 1986) and third (March-August 1987) periods than during the interim period of six months (September 1986-February 1987). By reducing slaughtering during

---

[1] Congress directed USDA to carry out the DPT through the Commodity Credit Corporation. 7 U.S.C. § 1445(d)(7). All references to USDA are intended to include the Commodity Credit Corporation to the extent it was involved in carrying out the DTP.

the interim period, Congress hoped to ease the effect of this dairy cattle disposal program on the beef market.

The beef market experienced no significant changes upon Congressional approval of the DTP in December 1985. Beef prices, however, began an unprecedented and precipitous decline four months later. On March 28, 1986, USDA announced regulations implementing disposal of cattle. Beef prices plummeted almost immediately. The futures market in Chicago actually closed down for days, making trade impossible. The market for beef remained unstable for months after the announcement.

Plaintiffs attribute the collapse of the beef market, and their subsequent loss of profits, to USDA's alleged failure to follow the standards set forth by Congress in the Food Security Act of 1985. Specifically, plaintiffs allege that USDA's regulations exercised too little control over the timing of the slaughters. USDA regulations, according to plaintiffs, did not ensure the slaughter of greater numbers of dairy cattle in the first and third disposal periods than in the second. According to plaintiffs, these inadequacies in the USDA regulations precipitated the panic which drove down meat prices.

USDA regulations permitted milk producers to slaughter their cattle any time within the five-or six-month disposal period specified in their contract. 7 C.F.R. § 1430-458. In addition, the regulations allowed dairy farmers to sell all of their heifers and calves and up to half of their cows before the beginning of the specified disposal period. *Id.* Consequently, under USDA regulations, plaintiffs charge that dairy farmers could have slaughtered 89.7% of their eligible dairy cattle in the first few days of the program. According to plaintiffs, this possibility triggered the collapse of the beef market.

As in fact implemented, the bids accepted by USDA for the first disposal period involved 65.5% of the total

cattle covered by the bids, 11.4% for the second disposal period, and 23.1% for the third. Thus, slaughtering in the first and third periods exceeded slaughtering in the second time frame. In operation, USDA regulations fulfilled the literal requirements of the 1985 Act with regard to timing of the slaughtering.

Plaintiffs also argue that USDA regulations did not maintain historical marketing patterns. USDA instructed county officers to accept bids for the earlier disposal period when a milk producer submitted identical bids for more than one period. USDA Agricultural Stabilization and Conservation Service, *Accepting DTP bids*, (Notice LD-257) (March 28, 1986). This policy "front-end loaded" the program. Historically, however, the first period occurred during a reason of the year when the marketing of beef for slaughter is low. Plaintiffs nonetheless contend that this policy violated the historical pattern provision of the 1985 law.

Finally, plaintiffs charge that USDA failed to cap the number of dairy cattle slaughtered at 7% of the national dairy herd per calendar year. Plaintiffs cited these policies as further reasons that beef futures investors abandoned the market.

A few days after USDA's March 28, 1986 announcement, seven beef producers' and three cattle producers' associations instituted a suit in the United States District Court for the Northern District of Texas to enjoin the regulations. *Shelton v. United States Dept. of Agric.*, Civ. A. No. CA-5-86-81 (N.D. Tx.). The Texas District Court granted a preliminary injunction within one month. This litigation ended with a settlement accepted by both USDA and the cattle producers' associations. Under this settlement, USDA agreed to modify the DTP in several ways. For instance, USDA agreed to encourage DTP participants with contracts for the first disposal period to shift their slaughtering to the second or third disposal

period. Plaintiffs contend, however, that this settlement only partially mitigated their damages.

Plaintiffs filed this action in the Claims Court on January 4, 1988, seeking compensatory damages. Plaintiffs make three claims against the United States. First, Congress created an implied mandate for monetary compensation under the DTP by imposing clear and objective requirements in the DTP to protect beef producers. Second, USDA's interference with plaintiffs' right to dispose of their cattle constitutes a taking under the fifth amendment to the Constitution. Third, the United States was unjustly enriched when it purchased large amounts of beef at depressed prices in the months following the implementation of the DTP.

Defendant moves to dismiss for lack of subject matter jurisdiction. Defendant maintains that Congress did not intend to provide monetary compensation under the DTP —a requirement for Tucker Act jurisdiction. Defendant also asserts a jurisdictional challenge to plaintiffs' unjust enrichment claim. Finally, defendant contests the merits of plaintiffs' fifth amendment taking claim. Plaintiffs filed a cross-motion for partial summary judgment asserting the absence of any genuine factual dispute.

DISCUSSION

Plaintiffs ask this court to transform defendant's juurisdictional motion into a motion to dismiss for failure to state a claim. Plaintiffs contend that this court has jurisdiction under the Tucker Act.

In assessing a motion to dismiss, whether on the ground of lack of subject matter jurisdiction or failure to state a cause of action, this court must accept the facts alleged in the complaint as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

Plaintiffs' mere allegation that their claim springs from a statute, constitutional provision, or contract does

not confer Tucker Act jurisdiction upon the Claims Court. A claim must arguably fit within the jurisdiction conferred by the Tucker Act to invoke Claims Court decisional authority. *Ralston Steel Corp. v. United States*, 169 Ct. Cl. 119, 125, 340 F.2d 663, 667, *cert. denied*, 381 U.S. 950 (1965). The Court of Claims set the standard for weighing RUSCC 12(b) motions:

> [A] claimant who says that he is entitled to money from the United States because a statute or a regulation grants him that right, in terms or by implication, can properly come to the Court of Claims, at least if his claim is not frivolous but arguable.

Id. Arguable claims satisfy all jurisdictional elements. Frivolous claims, when used in this context, do not necessarily imply abuse of process or bad faith. Claims are frivolous when they fail to satisfy each of the elements required to establish jurisdiction. *See also, Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105-06 (1933); *Truckee-Carson Irrigation Dist. v. United States*, 14 Cl. Ct. 361, 369, *aff'd*, 864 F.2d 149 (Fed. Cir. 1988).

The facts made available to the court and described herein establish that plaintiffs clearly fail to meet their jurisdictional burden under the Tucker Act. Consequently, this court must, as a matter of law, dismiss plaintiffs' complaint for lack of subject matter jurisdiction.

Statutory Claim

Plaintiffs contend that Congress created an implied mandate for compensation by imposing clear and objective requirements in the DTP to protect beef producers. Plaintiffs assert the Tucker Act as the basis for Claims Court jurisdiction:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an

> executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (1982).

For the Claims Court to adjudicate claims—even actions stemming from the Constitution, a federal statute, or an executive branch regulation—the claimant must seek money damages. *Eastport Steamship Corp. v. United States*, 178 Ct. Cl. 599, 605, 372 F.2d 1002, 1007 (1967). The Tucker Act does not supply an independent basis for monetary relief in the Claims Court. Rather, plaintiffs must invoke a substantive right to receive monetary compensation from the Government in some independent source of federal law, such as the Constitution or an Act of Congress. *Id.* at 1008. The Tucker Act merely confers jurisdiction upon the Claims Court to enforce independent rights to monetary relief. *United States v. Testan*, 424 U.S. 392, 398 (1976).

Thus, plaintiffs must show both that their claim springs from a source of federal law independent of the Tucker Act and that the independent law "can be fairly interpreted as mandating compensation by the Federal Government for the damage sustained." *Id.* at 400, *quoting Eastport*, 372 F.2d at 1009. In sum, plaintiffs must show an arguable right to monetary relief in a federal law outside the Tucker Act.

The DTP did not expressly mandate monetary compensation for beef producers in the event that USDA failed to obey the law. Plaintiffs concede the absence of an express damages remedy in 7 U.S.C. § 1446(d)(3), but assert instead that Congress implicitly mandated money damages. Plaintiffs find this implication in Congress's strong intent to protect beef producers from economic harm under the DTP. Plaintiffs claim this intent is evinced by guidelines that the USDA was required to follow during implementation of the program.

Congress's intent to protect beef producers does not alone create a monetary damages remedy. In 7 U.S.C. § 1446, Congress provided beef producers with prospective protections, rather than a retroactive monetary damages remedy. 7 U.S.C. § 1446 included specific periodical slaughtering quotas. Thus, beef producers could and did seek enforcement of these quotas in federal district court. Indeed the United States District Court for the Northern District of Texas granted a preliminary injunction halting the DTP for failure to comply with these quotas. Congress provided judicial protections for beef producers, but not monetary damages.

The legislative history of the 1985 Act also discloses no Congressional intent to create a damages remedy. The potential threat to beef producers was prominent throughout the Congressional proceedings leading to enactment of the DTP. Nonetheless, at no point does the legislative history indicate that Congress even contemplated compensating beef producers for lost profits. The legislative history requires the Secretary of Agriculture to comply with certain statutory regulations of the Act, but nowhere mentions a monetary remedy for injured beef producers.[2]

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[2] The legislative history states in pertinent part:

> In setting the terms and conditions of reduced production and production termination milk diversion contracts, the Secretary would be required to take into account the adverse effects of diversion contracts on beef, pork, and poultry producers and take all feasible steps to minimize such effects.
>
> Before the beginning of a fiscal year in which a milk diversion program is to be in effect, the Secretary would be required to estimate the number of dairy cattle that will be marketed for slaughter as a result of the program. The Secretary also would be required to specify marketing procedures, under contracts under the program, to ensure that not more than 40 percent of the number of dairly cattle that he estimates will be marketed for slaughter by producers participating in the program in excess of the number of dairy cattle they would market in the absence of the program will be so

Plaintiffs rely on several cases where the Court of Claims or the Claims Court granted jurisdiction in the absence of an express statutory provision for monetary damages. This court, however, finds distinctions in each of those cases.

In *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), the Supreme Court reviewed various federal statutes granting the Government full responsibility for managing resources and lands on the Quinault Indian

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marketed in October, November, December, January, February, and September of that fiscal year. The procedures would have to ensure that the excess sales for slaughter occur on a basis that maintains historical marketing pattern. In addition, the Secretary would be required to limit the total dairy cattle slaughter rate under the program in excess of the historical dairy cow herd culling rate to no more than seven percent of the national dairy cow herd.

. . . .

Section 214 provides that, to minimize the adverse effect of a milk diversion program, carried out during any fiscal year under the bill on beef, pork, and lamb producers in the United States, in such fiscal year—

(1) the Secretary of Agriculture must use funds available for food donations under section 32 of Public Law 320, Seventy-Fourth Congress, other funds available to the Secretary under the commodity distribution and other nutrition programs of the Department of Agriculture, and funds available through the Commodity Credit Corporation, to purchase and distribute two hundred million pounds of red meat in addition to those quantities normally purchased and distributed by the Secretary.

(2) the Secretary of Defense and other Federal agencies, to the maximum extent practicable, must use increased quantities of red meat to meet the food needs of the programs that they administer, and State agencies would be encouraged to cooperate in such an effort; and

(3) the Secretary of Agriculture must act to encourage the consumption of red meat by the public.

H.R. No. 271(I), 99th Cong., 1st Sess., 205, 208, *reprinted in* 1985 U.S. Code Cong. & Admin. News, 1308-09, 1311-12.

Reservation for the benefit of the Indians. The Court concluded that these statutes could fairly be interpreted as mandating compensation by the United States for damages sustained by the Indians. The critical element in the Court's recognition of a damage remedy was the existence of a trust relationship. The right to sue a trustee for damages was a "fundamental incident" of the trust relationship. *Id.* at 226. Because the United States held the reservation in trust for the Indians, the Indians could sue for breach of trust. Unlike the trust relationship in *Mitchell II*, no special relationship exists between beef producers and the United States. USDA entered into agreements with dairy farmers, not beef producers. Moreover, Congress chose to protect beef producers with quotas enforceable by injunction, rather than with a monetary remedy.

Plaintiffs also cite *Barber v. United States*, 230 Ct. Cl. 287, 676 F.2d 651 (1982), to support the proposition that this court can imply a damages remedy. In *Barber*, the widow of a serviceman sought annuity payments under the Armed Forces Survivor Benefit Act. 10 U.S.C. § 1448(a) (1982). The Act and regulations promulgated thereunder require the armed forces to notify the serviceman's spouse in writing if the serviceman elects to reduce or eliminate payments into the annuity fund. The Air Force failed to notify Mrs. Barber of her husband's election. The Act did not state that a serviceman's spouse may recover the value of the annuity from the United States, but the Court of Claims nonetheless allowed plaintiff to obtain money damages.

Barber, however, merely preserved a statutory entitlement to money. The Act promised the spouse money in the form of an annuity. The surviving spouse retained the annuity entitlement because the Government failed to notify her that her husband elected to cancel his scheduled payments into the annuity fund. In the case at bar, plaintiffs present no evidence that Congress created an

entitlement to a certain market price for beef. Thus, the *Barber* principle—money or preservation of an entitlement to money in the fact of a miscarriage by the Government which caused a lapse in the entitlement—does not apply.

This case does not fall within the narrow circumstances in which money-mandating provisions have been implied in the past. Congress must specifically mandate monetary compensation. Because there is no explicit language by Congress indicating its consent to suit by injured beef producers, and because the legislative history is void of such an intent, this court lacks subject matter jurisdiction over this claim.[3]

Though Congress provided no monetary remedy for beef producers, it did provide a remedy in the form of an injunction, which plaintiffs invoked in an earlier lawsuit. Ironically, plaintiffs relied on the theory that they could not recover money damages to persuade the district court to grant the equitable relief.

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[3] Other cases cited by plaintiffs still do not alter the long line of cases discouraging courts from interpreting statutes to include monetary damages by implication. In *Bisom v. United States*, 5 Cl. Ct. 454 (1984), plaintiff, a federal employee who alleged improper discharge from employment, sought back pay even though the statute in question did not contain any express provision. The court held that where Congress grants certain employees removal protections, a remedy for financial loss in the event of an unlawful discharge is necessarily implied. *Id.* at 457. This case followed many precedents granting jurisdiction to suits for back pay. These cases have reasoned that the only remedy for wrongful denial of pay is money. *United States v. Wickersham*, 201 U.S. 390, 399 (1906).

In *Grav v. United States*, 14 Cl. Ct. 390, (1988), *aff'd*, No. 89-1180, slip op. (Fed. Cir. Oct. 4, 1989), Congress required the Secretary of Agriculture, under a milk diversion program, to enter into contracts with any producer who qualified for the program. The court relied on an implied-in-fact contract, not an implied money-mandate, to justify an award of a money damages.

Fifth Amendment Taking

Plaintiffs assert in their second claim that the value of their cattle was substantially reduced as a result of USDA's implementation of the DTP. This reduction, they contend, constitutes a taking under the fifth amendment of the United States Constitution, which prohibits the Government from taking private property without just compensation.

Property consists of a bundle of rights including possession, use, and disposal. *Andrus v. Allard*, 444 U.S. 51 (1979); *see also United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945). Plaintiffs contend that the property right at issue in this case is the right of disposal. Though plaintiffs admit that the Government did not completely prevent them from disposing of their cattle, they contend that it substantially interfered with this right.

Plaintiffs characterize the alleged taking as a "regulatory taking" as oppposed to actual confiscation of their property by the Government. Indeed, USDA did not actually seize any cattle. Regulatory takings are those in which the Government, by regulatory action, diminishes the value or usefulness of private property. *Hall v. City of Santa Barbara*, 813 F.2d 198, 202 (9th Cir. 1987). Plaintiffs claim that USDA's implementation of the DTP created enough uncertainty in the beef market to cause the market collapse. This collapse, according to plaintiffs, reduced the price of beef so substantially as to be tantamount to outright appropriation of the cattle.

The Supreme Court stated, in addressing the issue of regulatory takings, that governmental regulation "does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land,'" *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987), *quoting Agins v. Tiburon*, 447 U.S. 255, 260 (1980). The Court

suggests that the first prong of this test—a legitimate state interest—requires a "fit" between the purpose of the regulation and the burden placed upon the property owner. *Id.* at 838. The second prong of the test requires the plaintiff to show that the governmental action diminished the value of a significant aspect of the plaintiff's property. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922).

According to the facts of the present case, plaintiffs clearly fail to meet their burden with respect to the second prong of the test. Therefore, this court need not address the issue of regulatory "fit." Plaintiffs in this case claim the manner in which USDA implemented the DTP substantially reduced the value of their cattle, which, in turn, discouraged disposal. However, the Government never prevented plaintiffs from disposing of their cattle nor did it render them valueless. Their expected profits were merely reduced as a result of Government action.

The Court of Claims held in a number of cases regarding administrative takings that consequential damages, such as reduced profits, resulting from lawful agency action are not recoverable. *Carruth v. United States*, 224 Ct. Cl. 422, 446, 627 F.2d 1068, 1081 (1980); *Mosca v. United States*, 189 Ct. Cl. 283, 417 F.2d 1382 (1969), *cert. denied*, 399 U.S. 911 (1970). The facts of this case are similar to those of a recent Federal Circuit case. *Galloway Farms, Inc. v. United States*, 834 F.2d 998 (Fed. Cir. 1987). Appellants in *Galloway* asserted that a Government grain embargo caused a reduction in profits from the sale of their farm products. The Federal Circuit held that losses which result from commercial interference due to lawful Government action provided no fifth amendment remedy. *Galloway*, 834 F.2d at 1002.

Plaintiffs argue that USDA's implementation of a program directed at the dairy industry commercially in-

terfered with the beef market. As a result, beef producers experienced a loss of expected profits resulting from the Government action. This loss of expected profits does not give rise to an actionable fifth amendment taking.

Moreover, plaintiffs allege that the Government acted unlawfully. Plaintiffs assert on numerous occasions that USDA "violated" the statutory requirements imposed upon it by Congress. Yet, for a taking claim within the Claims Court's Tucker Act jurisdiction, governmental action must be correct and authorized. *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 898-99 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987). Claims of unlawful Government action are outside this court's takings clause jurisdiction.

Unjust Enrichment

Plaintiffs, in their final claim, assert that the Government was unjustly enriched when it purchased large amounts of beef at depressed prices. Plaintiffs contend that these depressed prices were the result of USDA's failure to carry out the intent of Congress with respect to the implementation of the DTP. The Government purchased this beef both in the ordinary course of affairs and pursuant to the requirements of § 104 of the Food Security Act of 1985.[4] Congress intended to benefit the beef industry through these increased purchases, not injure it. At oral argument, however, plaintiffs stated that they expected the Government to purchase this beef at a "reasonable" market price.

The Claims Court possesses jurisdiction pursuant to the Tucker Act to entertain suits based upon implied con-

---

[4] Section 104 of the Food Security Act of 1985 required USDA to purchase 400,000,000 pounds of red meat in addition to those quantities normally purchased. 7 U.S.C. § 1446, note at pp. 671-72 (1988).

tracts with the Government. This clause, however, has been narrowly construed as referring only contracts implied-in-fact. *Mitchell II*, 463 U.S. at 218. Contracts implied-in-law are equitable in nature. They are not based on an agreement between the parties, but impose a duty at law to prevent injustice. *Aetna Casualty & Surety Co. v. United States*, 228 Ct. Cl. 146, 164, 655 F.2d 1047, 1059-60 (1981); *Hirschmann v. United States*, 11 Cl. Ct. 338, 342 (1986). An unjust enrichment claim rests on a contract implied-in-law over which this court lacks jurisdiction. *EWG Assocs., Ltd. v. United States*, 231 Ct. Cl. 1028, 1030 (1982) (Order); *Fincke v. United States*, 230 Ct. Cl. 233, 246, 675 F.2d 289, 296 (1982).

CONCLUSION

No statute exists which can be fairly construed as mandating compensation from the United States for the damages sustained by beef producers. These alleged damages—reduced profits resulting from lawful Government action—are not recoverable in this court. In addition, the Tucker Act does not confer jurisdiction upon this court to entertain claims based upon the doctrine of unjust enrichment.

Therefore, this court grants defendant's motion to dismiss the complaint for lack of subject matter jurisdiction and denies plaintiffs' cross-motion for partial summary judgment. The Clerk of the court is directed to enter judgment dismissing the complaint.

No costs.

/s/ Randall R. Rader
RANDALL R. RADER
Judge

IN THE UNITED STATES CLAIMS COURT

No. 2-88 C

ALTA VERDE INDUSTRIES, INC., *et al.*

v.

THE UNITED STATES

JUDGMENT

[Filed Nov. 15, 1989]

Pursuant to the opinion of November 15, 1989, granting defendant's motion to dismiss the complaint for lack of subject matter jurisdiction and denying plaintiffs' cross-motion for partial summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

FRANK T. PEARTREE

Clerk of Court

By: /s/ Linda A. Eddins
Deputy Clerk

November 15, 1989

NOTE: As to appeal, 60 days from this date, see RUSCC 72. Filing fee is $105.00

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-5037

ALTA VERDE INDUSTRIES, INC., MIKE BASHAM; INNIS CROFT; GLENN DEVINE; EIDEL RANCH, INC.,; DONALD E. FRANZ, JR.; ROBERT GARAMENDI; GODFATHER RANCHES, INC.; PATRICK K. GOGGINS; GEORGE W. GOWER; ROBERT G. HUSBAND; LAWRENCE T. JOHNSON; MET JOHNSON; KLM CATTLE COMPANY; LOS CEDROS; DOUGLAS G. MAHON, III; METRO NATIONAL CORPORATION; JOSEPH H. RUSSELL; RONALD SACCANI; RICHARD SCHWARTZBARD; JAMES MARK SMITH; SPARROWK LIVESTOCK COMPANY, INC.; JACK SUITS; WM. BARRETT TRAVIS; DAVID WANJURA, and G. DALE WHITTINGTON; individually and on behalf of all others similarly situated, *Plaintiffs-Appellants*,

v.

THE UNITED STATES,
Defendant-Appellee.

ORDER

Before MARKEY, Circuit Judge, MICHEL, Circuit Judge, and BREWSTER.

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on July 13, 1990.

FOR THE COURT,

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated: July 6, 1990

cc: WILLIAM C. WATT
GEORGE M. BEASLEY, III

STATUTES INVOLVED

28 U.S.C. § 1491(a)(1) (1988)

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

7 U.S.C. § 1446(d)(3) (1988)

§ 1446. Price support levels for designated nonbasic agricultural commodities

The Secretary is authorized and directed to make available (without regard to the provisions of sections 1447 to 1449 of this title) price support to producers for tung nuts, sunflower seeds, honey, and milk as follows:

* * * *

(d) Notwithstanding any other provision of law—

* * * *

(3)(A)(i) The Secretary shall establish and carry out under this paragraph a milk production termination program for the 18-month period beginning April 1, 1986.

(ii) Under the milk production termination program required under this subparagraph, the Secretary, at the

request of any producer of milk in the United States who submits to the Secretary a bid, may offer to enter into a contract with the producer for the purpose of terminating the production of milk by the producer in return for a payment to be made by the Secretary.

(iii) For the 18-month period for which the milk production termination program under this subparagraph is in effect, the Secretary shall—

(I) as soon as practicable, determine the total number of dairy cattle the Secretary estimates will be marketed for slaughter as a result of such program; and

(II) by regulation specify marketing procedures to ensure that greater numbers of dairy cattle slaughtered as a result of the production termination program provided for in this section shall be slaughtered in each of the periods of April through August 1986, and March through August 1987 than for the other months of the program. Such procedures also shall ensure that such sales of dairy cattle for slaughter shall occur on a basis estimated by the Secretary that maintains historical seasonal marketing patterns. During such 18-month period, the Secretary shall limit the total number of dairy cattle marketed for slaughter under the program in excess of the historical dairy herd culling rate to no more than 7 percent of the national dairy herd per calendar year.

(iv) Each contract made under this subparagraph shall provide that—

(I) the producer shall sell for slaughter or for export all the dairy cattle in which such producer owns an interest;

(II) during a period of 3, 4, or 5 years, as specified by the Secretary in each producer contract and

beginning on the day the producer completes compliance with subclause (I), the producer neither shall acquire any interest in dairy cattle or in the production of milk nor acquire, or make available to any person, any milk production capacity of a facility that becomes available because of compliance by a producer with such subclause unless the Secretary shall by regulation otherwise permit; and

(III) if the producer fails to comply with such contract, the producer shall repay to the Secretary the entire payment received under the contract, including simple interest payable at a rate prescribed by the Secretary, which shall, to the extent practicable, reflect the cost to the Corporation of its borrowing from the Treasury of the United States, commencing on the date payment is first received under such contract.

(v) Any producer of milk who seeks to enter into a contract for payments under this paragraph shall provide the Secretary with (I) evidence of such producer's marketing history; (II) the size and composition of the producer's dairy herd during the period the marketing history is determined; and (II) the size and composition of the producer's dairy herd at the time the bid is submitted, as the Secretary deems necessary and appropriate.

(vi) Except as provided in subparagraph (D), no producer who commenced marketing of milk in the 15-month period ending March 31, 1986, shall be eligible to enter into a contract for payments under this subparagraph.

(vii) A contract entered into under this paragraph by a producer who by reason of death cannot perform or assign such contract may be performed or assigned by the estate of such producer.

(B) The Secretary may establish and carry out a milk diversion or milk production termination program for

any of the calendar years 1988, 1989, and 1990 as necessary to avoid the creation of burdensome excess supplies of milk or milk products.

(C) In setting the terms and conditions of any milk diversion or milk production termination under this paragraph and of each contract made under this subparagraph, the Secretary shall take into account any adverse effect of such program or contracts on beef, pork, and poultry producers in the United States and shall take all feasible steps to minimize such effect.

* * * *

7 U.S.C. § 1446, note at pp. 671-72 (1988)

Avoidance of Adverse Effect of Milk Production Termination Program on Beef, Pork, and Lamb Producers

Section 104 of Pub.L. 88-198 provided that:,

"To minimize the adverse effect of the milk production termination program on beef, pork, and lamb producers in the United States during the 18-month period for which such program is in effect under section 201(d) of the Agricultural Act of 1949 (7 U.S.C. 1446(d)) [subsec. (d) of this section], in such period—

> "(1) the Secretary of Agriculture shall use funds available for the purposes of clause (2) of section 32 of the Act entitled 'An Act to amend the Agricultural Adjustment Act, and for other purposes' (7 U.S.C. 612c), approved August 14, 1935, including the contingency funds appropriated under such section 32, and other funds available to the Secretary under the commodity distribution and other nutrition programs of the Department of Agriculture, and including funds available through the Commodity Credit Corporation, to purchase and distribute 200,000,000 pounds of red meat in addition to those quantities normally purchased and distributed by the

Secretary. Such purchases by the Secretary shall not reduce purchases of any other agricultural commodities under section 32;

"(2) the Secretary of Agriculture shall use funds available through the Commodity Credit Corporation to purchase 200,000,000 pounds of red meat, in addition to those quantities normally purchased and distributed by the Secretary, and to make such meat available—

"(A) to the Secretary of Defense, on a nonreimbursable basis, for use in commissaries on military installations located outside of the United States; or

"(B) for export under the authority of any law in effect on or after the date of the enactment of this Act [Dec. 23, 1985];

"(3) the Secretary of Defense and other Federal agencies, to the maximum extent practicable, shall use increased quantities of red meat to meet the food needs of the programs that they administer, and State agencies are encouraged to cooperate in such effort; and

"(4) the Secretary of Agriculture shall encourage the consumption of red meat by the public."

REGULATIONS INVOLVED

7 C.F.R. §§ 1430.450, .456-.458 (1989)

7 CFR Ch. XIV Commodity Credit Corporation, USDA

Subpart—Dairy Termination Program

AUTHORITY: Sec. 201 of the Agricultural Act of 1949, as amended, 63 Stat. 1052, as amended (7 U.S.C. 1446 (d)); secs. 4 and 5 of the Commodity Credit Corporation Charter Act, 62 Stat. 1070, as amended, 1072, as amended (15 U.S.C. 714 b and c).

SOURCE: 51 FR 7915, Mar. 7, 1986, unless otherwise noted.

§ 1430.450 General statement.

This subpart implements the Dairy Termination Program which is authorized by section 201(d)(3) of the Agricultural Act of 1949, as amended by the Food Security Act of 1985 (Pub. L. 99-198) for the eighteen-month period beginning April 1, 1986. The purpose of the program is to achieve reductions in the quantity of milk marketed for commercial use. Under the program, the Commodity Credit Corporation will enter into contracts with producers under which producers will agree to sell their dairy cattle for slaughter or export and terminate milk production for a five-year period.

* * * *

§ 1430.456 Bid submission.

(a) The bid shall be stated in a dollar amount per hundredweight to the nearest penny which, when multiplied by the contract base, shall equal the total payment which may be made by CCC under the contract if the bid is accepted. A producer's bid may not be withdrawn after the last date for bid submission established by CCC. CCC is not obligated to accept any bid and may give preference

by contract disposal periods to submitted bids. The maximum bid per hundredweight which is accepted may vary by region if such variances are determined to be needed to avoid undue disruption of dairy markets. The bid shall be submitted by signing the contract which shall set forth the bid or bids of the producer(s). If a bid is accepted by CCC the requirements of the contract and this subpart shall be applicable even if, by reason of noncompliance with the eligibility requirements of § 1430.453 of this subpart, none of the participating producers are entitled to payment under the contract.

(b) A bid may be submitted for one or more of the three following disposal periods:

(1) April 1, 1986 through August 31, 1986;

(2) September 1, 1986 through February 28, 1987;

(3) March 1, 1987 through August 31, 1987.

(c) When a bid is accepted by CCC, a representative of CCC will sign the contract and a copy of the executed contract will be supplied to each participating producer. The period for which the bid is accepted shall be the contract disposal period.

§ 1430.457 Dairy herd disposal and non-production period requirements.

(a) All dairy cattle, which on or after the bid date were located on any unit with respect to which any participating producer or related person was a producer on or after January 1, 1986, shall be sold for slaughter or export by the end of the contract disposal period in accordance with the provisions of § 1430.458 of this subpart. In addition, all dairy cattle in which any such producer or related person had an interest on or after the bid date shall be so sold by the end of the contract disposal period.

(b) During the five year nonproduction period as calculated under the provisions of § 1430.459 of this subpart, no participating producer or related person may have, retain, or acquire any interest in dairy cattle or in the production of milk.

(c) No participating producer or related person shall, during the nonproduction period, acquire or make available to any person any production facility that becomes available for use as a result of the compliance by any person with any DTP contract. This restriction shall be considered to include, but not be limited to, any milk production facility used by any participating producer or related person on or after January 1, 1986, to produce milk. The use by any person of such a facility during the nonproduction period for a contract shall be a violation of the terms and conditions of the contract regardless of whether the participating producer or related person owns, or has owned, the milk production facility.

(d) No milk production facility on any unit with respect to which any participating producer or related person was a producer on or after January 1, 1986, may be used by any person to produce milk or to maintain dairy cattle during the nonproduction period and no new milk production facility may be brought into use on such unit during the nonproduction period.

(e) Unless CCC shall otherwise agree in writing, if any participating producer or related person involuntarily acquires an interest in dairy cattle or in the production of milk as a result of the death of another person or otherwise, the total amount of payments which are due under the contract shall be reduced by the amount of any gross proceeds realized by an such producer or related person from the use or sale of such interest.

§ 1430.458 Sales for slaughter or export.

(a) All dairy cattle which are required to be sold for slaughter or export under the provisions of this subpart

shall be branded if such dairy cattle have not been sold by the date that the principal producer receives notice that the contract has been accepted by CCC.

(b) There may be no more than one intermediate purchase of any dairy cattle which are required to be sold for slaughter or export under the provisions of this subpart between the date of sale for that purpose and the date of the actual slaughter or export of such dairy cattle.

(c) The participating producers in the contracting entity shall be responsible for ensuring that any purchaser of dairy cattle which are sold to meet the requirements of the contract has, with respect to each such sale, signed a notice on a CCC-approved form listing the type, weight, price and final slaughter or export date for the dairy cattle. Such notice will not relieve the participating producers of their liability for any failure of such cattle to be slaughtered or exported by the required date. Any such failure shall be a violation of terms and conditions of the contract. Each notice signed by a purchaser of dairy cattle as prescribed in this paragraph shall be submitted to the county ASCS office by the tenth day of the month following the month in which the sale to meet the requirements of the contract occurred.

(d) Not more than 50 percent of the dairy cows on any unit to which the requirements for slaughter and export in this subpart are applicable may be slaughtered before the beginning of the contract disposal period.

(e) (1) Except as provided in paragraph (e) (2), all dairy cattle which are to be sold for slaughter or export in accordance with the terms and conditions of the contract must be slaughtered or exported by the end of the contract disposal period.

(2) Notwithstanding the provisions of paragraph (e) (1), if the contract disposal period ends on August 31,

1986, calves and unbred (nonpregnant) heifers may be slaughtered not later than September 30, 1986. In addition, with respect to contracts entered into for the third disposal period, CCC may permit dairy cattle sold for export to be exported not later than September 30, 1987.

(f) Subject to the final date for slaughter or exports as prescribed by the provisions of paragraph (e), the sale of dairy cattle for slaughter or export shall be subject to the following additional time limitations:

(1) All cows and bred (pregnant) heifers sold for slaughter must be slaughtered within 15 days from the date such cows and bred heifers were sold for that purpose;

(2) Calves and unbred heifers sold for slaughter must be slaughtered within six months from the date such calves and unbred heifers were sold for that purpose;

(3) Dairy cattle sold for export must be exported within 45 days from the date such cattle have been sold for that purpose.

(g) Dairy cattle sold for export shall be considered to have been exported only if such cattle are exported outside the fifty States of the United States, its territories and possessions and do not reenter the fifty States of the United States, its territories and possessions at any time after such export.

(h) In order to establish the export or slaughter of any head of dairy cattle, the contracting entity must present to the county ASCS office with respect to such cattle:

(1) All sales receipts relating to such sale including any receipt generated by a sale by an intermediate buyer;

(2) All notices required by this subpart to be signed by the purchasers of such cattle; and

(3) (i) For any dairy cattle sold for slaughter, a certificate of slaughter by the slaughtering party unless other acceptable evidence of slaughter has been presented;

(ii) For any dairy cattle exported to a country other than Canada or Mexico, a certificate of inspection showing the export of the dairy cattle issued by the Animal and Plant Health Inspection Service, United States Department of Agriculture; and,

(iii) For any dairy cattle exported to Canada or Mexico, a certification of exportation issued by United States customs officials or a certification of importation by officials of the importing country, unless other acceptable evidence of export to Canada or Mexico is presented.

(i) any dairy cattle which are destroyed because of disease or for any other reason shall be considered to have been sold for slaughter.

Supreme Court, U.S.
FILED
JAN 4 1991
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-578

In the Supreme Court of the United States

OCTOBER TERM, 1990

ALTA VERDE INDUSTRIES, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
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QUESTION PRESENTED

Whether the Food Security Act of 1985, 7 U.S.C. 1446(d)(3), requires the United States to compensate beef producers for losses incurred as a consequence of the Department of Agriculture's implementation of the Act.

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ALTA VERDE INDUSTRIES, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-2a) is noted at 907 F.2d 158. The opinion of the Claims Court (Pet. App. 3a-18a) is reported at 18 Cl. Ct. 595.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1990. A petition for rehearing was denied on July 6, 1990. Pet. App. 20a-21a. The petition for a writ of certiorari was filed on October 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. As part of the Food Security Act of 1985, 7 U.S.C. 1446(d)(3), Congress established the Dairy Termination Program (DTP) as a means of reducing over-production of milk and reducing federal dairy subsidies. H.R. Rep. No. 271, 99th Cong., 1st Sess. 20-21, 205-207 (1985). Under the program, dairy farmers could contract with the Department of Agriculture (USDA) to dispose of their dairy cattle and to suspend production of milk for five years in exchange for incentive payments from the USDA and the retention of proceeds from the sale of their cattle. Recognizing that the program would increase the supply of beef on the market—and thereby reduce prices for producers of meat—Congress directed the Secretary in the DTP to take "all feasible steps" to minimize adverse effects on beef, pork, and poultry producers resulting from the program, 7 U.S.C. 1446(d)(3)(C), and to specify by regulation certain prescribed marketing procedures for the dairy cattle slaughtered pursuant to the program. 7 U.S.C. 1446(d)(3)(A)(iii)(II).[1]

On March 28, 1986, the USDA announced its regulations to implement the program. Thereafter, beef prices dropped significantly, and the market for beef remained unstable for months. Pet. App. 6a.

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[1] Congress also provided, in order "[t]o minimize the adverse effect of the milk production termination program on beef, pork, and lamb producers in the United States," that the Secretary of Agriculture purchase 400 million pounds of red meat in addition to quantities normally purchased and distributed by the Secretary; that the Secretary of Defense and other federal agencies increase the use of red meat to satisfy the needs of food programs; and that the Secretary encourage the public to eat red meat. 7 U.S.C. 1446 note, at 671-672.

2. Petitioners, 26 ranchers who sold beef in the months following the announcement of USDA's regulations, filed a complaint in the United States Claims Court seeking money damages pursuant to the Tucker Act, 28 U.S.C. 1491(a)(1). Petitioners alleged that "inadequacies in the USDA regulations precipitated [a] panic which drove down meat prices," causing them to lose profits. Pet. App. 6a. Petitioners further alleged that the Food Security Act created an "implied mandate" that beef producers be compensated for the injuries they experienced from the USDA's improper administration of the statute. *Id.* at 8a-9a.

The Claims Court dismissed petitioners' claims for lack of jurisdiction under the Tucker Act. The court explained that "[t]he Tucker Act does not supply an independent basis for monetary relief"; instead, "plaintiffs must invoke a substantive right to receive monetary compensation from the Government in some independent source of federal law." Pet. App. 10a. In making that showing, the court continued, plaintiffs must establish "that the independent law 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " *Ibid.*, quoting *United States* v. *Testan*, 424 U.S. 392, 400 (1976).

Here, the court noted, the Food Security Act of 1985 "did not expressly mandate monetary compensation for beef producers in the event that USDA failed to obey the law." Pet. App. 10a. Conceding that an express damages provision was absent, petitioners urged that "Congress implicitly mandated money damages." *Ibid.* But the court rejected petitioners' effort to imply a damages remedy where none was provided expressly. The court noted that the

Food Security Act's legislative history disclosed "no Congressional intent to create a damages remedy," *id.* at 11a, and that no decision of this Court or of the Claims Court supported the inference that petitioners were entitled to damages because of the Secretary's alleged violation of the requirements of the statute. *Id.* at 12a-14a. The court concluded:

> This case does not fall within the narrow circumstances in which money-mandating provisions have been implied in the past. Congress must specifically mandate monetary compensation. Because there is no explicit language by Congress indicating its consent to suit by injured beef producers, and because the legislative history is void of such an intent, this court lacks subject matter jurisdiction over this claim.

Id. at 14a.[2]

3. The Federal Circuit affirmed, per curiam, without opinion. Pet. App. 1a-2a.

ARGUMENT

The conclusion of both courts below that the Food Security Act of 1985 does not mandate the payment of compensation to petitioners is correct and consistent with well-established principles governing the government's liability under the Tucker Act. There is no conflict with any decision of this Court or of any other court of appeals. Moreover, because the

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[2] Petitioners also urged that the Claims Court had Tucker Act jurisdiction to grant relief based upon the Takings Clause of the Fifth Amendment, and upon an "unjust enrichment" theory. Pet. App. 8a. The Claims Court rejected those theories for recovery as well, *id.* at 15a-18a, as did the Federal Circuit in affirming the judgment, *id.* at 1a-2a. Petitioners do not press those claims in this Court. Pet. 5-6.

Food Security Act created a limited-duration program that has now expired, the issue petitioners present has no continuing significance.

1. Petitioners contend (Pet. 12-21) that they are entitled to compensation under the Tucker Act for damages they suffered as a consequence of the Secretary of Agriculture's allegedly improper implementation of the Food Security Act. It is a cardinal principle of Tucker Act jurisprudence that "the Tucker Act 'does not create any substantive right enforceable against the United States for money damages.'" *United States* v. *Mitchell*, 463 U.S. 206, 216 (1983). Rather, "[a] substantive right must be found in some other source of law, such as 'the Constitution, or any Act of Congress, or any regulation of an executive department.'" *Ibid.* In considering a claim for payment under the Tucker Act, the crucial issue is whether "the source of substantive law can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Id.* at 218.

Petitioners readily concede that the Food Security Act contains no explicit authorization for their claim to compensation for alleged lost profits. Pet. 13 ("Admittedly, the petitioners here cannot point to language in the Food Security Act that expressly grants beef producers the right to sue the United States if the USDA ignores its statutory duties under the Act."). Moreover, petitioners acknowledge a complete lack of support in the legislative history for their present claim to financial redress from the government. *Ibid.* Those concessions are not only well advised, but also dispositive of their contention that Congress intended to establish an insurance scheme for the beef industry when it au-

thorized the Secretary of Agriculture to administer a program designed to "reduce federal dairy price support payments." Pet. App. 4a. As the Claims Court correctly concluded after canvassing the language, purposes, and legislative history of the Food Security Act of 1985, there is simply no evidence that Congress "even contemplated compensating beef producers for lost profits." Pet. App. 11a.[3]

2. Petitioners nevertheless rely (Pet. 14-21) on a potpourri of theories to support an "implied" right to compensation for their losses resulting from the operation of the Act. None of those claims, which read into the statute a remedy that Congress failed to provide, has merit.

a. Petitioners first seek (Pet. 14-15) to draw an analogy between the statutes found to give rise to an implied right to compensation in *United States* v. *Mitchell*, *supra*, and the Food Security Act of 1985. *Mitchell*, however, affords no comfort for petitioners.

In *Mitchell*, the Court considered a network of timber-management statutes and regulations governing land held in trust for Indians, which, collectively, gave the government "full responsibility to manage Indian resources and land for the benefit of the Indians * * * thereby establish[ing] a fiduciary rela-

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[3] Congress gave explicit attention to the potential impact of liquidating herds of dairy cattle on the market for beef, and provided the remedies it saw fit. Not only did Congress give instructions to the Secretary about how to administer the program to avoid undue market disruption, 7 U.S.C. 1446(d)(3)(A)(iii), it also provided for substantially increased governmental purchasing of red meat and commanded the Secretary to "encourage the consumption of red meat by the public." 7 U.S.C. 1446 note, at 671-672. The absence of any provision manifesting an intention to compensate the beef industry financially is conspicuous.

tionship and defin[ing] the contours of the United States' fiduciary responsibilities." 463 U.S. at 224. The fiduciary relationship flowed from the language of the pertinent provisions; the assumption by the government of pervasive control over the property of Indians; and "the undisputed existence of a general trust relationship between the United States and the Indian people." *Id.* at 224-225. The Court concluded that the fiduciary obligations created in that setting "can fairly be interpreted as mandating compensation" if the government breached its trust obligations toward Indians by mismanaging timber resources on their land. *Id.* at 226.

It is difficult to imagine a statutory context more removed from *Mitchell*'s than is the Food Security Act. Nothing in the language of that Act remotely suggests that the United States assumed fiduciary responsibilities towards that beef industry; the Act does not require the government to manage property owned by petitioners; and petitioners do not even claim that there is any historic basis for inferring the existence of a fiduciary relationship towards cattle ranchers. Congress's direction to the Secretary of Agriculture to ameliorate the anticipated market effects of liquidating dairy cattle simply reflects regulatory policy in economic matters; it does not convert the government into a trustee for the Nation's beef producers.

b. Petitioners further attempt (Pet. 15-16) to predicate a claim to compensation on their allegations that the government stood to benefit from mismanaging the DTP program, and that the economic gain the government derived came at the expense of beef producers. From this premise, they contend that they have a claim based upon *Eastport Steamship Corp.* v.

United States, 372 F.2d 1002, 1008 (Ct. Cl. 1967), which noted that a right to compensation exists "to recover an illegal exaction" of money where "the Government has the citizen's money in its pocket."

That theory does not apply here; it applies only to those situations "in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum." 372 F.2d at 1007. Such a claim is considered to be derived from a statute because the government had exacted the money "based upon a power supposedly conferred" by the statute. *Id.* at 1008. Petitioners, however, do not allege that the USDA exacted any money from them. Rather, petitioners' claim, at bottom, is simply a reformulation of the "unjust enrichment" theory that petitioners unsuccessfully urged in the courts below, see Pet. App. 17a-18a, and elected not to press in this Court. Pet. 5.

c. Petitioners next rely (Pet. 16-18) on *Grav* v. *United States*, 886 F.2d 1305 (Fed. Cir. 1989), to support their claim that the Secretary's alleged violation of law in a regulatory program gives rise to a right of compensation in their behalf. In *Grav*, a milk producer had sold his dairy cattle for slaughter and had submitted an application for payment to the Secretary under the Milk Diversion Program, a predecessor to the DTP. When the Secretary denied payment, the producer brought a Tucker Act claim. The Federal Circuit found that Tucker Act jurisdiction existed, but for reasons that are wholly inapplicable here. The court concluded that the applicable statute, 7 U.S.C. 1446(d)(3)(A) (Supp. I 1983), was a "money mandating statute" because it left the Secretary of Agriculture with no discretion to refuse to enter into contracts with any applicant who was

qualified to participate in the program. 886 F.2d at 1307. Whatever the merits of the court's interpretation of that provision, petitioners are not similarly situated. There is nothing in the Food Security Act that obligated the Secretary to enter into contracts with petitioners.[4]

Indeed, this case is more analogous to *Yancey* v. *United States*, 915 F.2d 1534 (1990), in which the Federal Circuit rejected a claim that a turkey grower was entitled to compensation from the United States because he suffered a loss in selling his healthy turkey breeder stock as a result of a quarantine imposed by the USDA. The court explained that "Congress' failure to explicitly create a right of compensation for healthy animals" defeated the grower's claim under the Tucker Act. *Id.* at 1539.

Petitioners understate the breadth of their own theory in asserting (Pet. 17) that it would have only the modest consequence of affording compensation for injured beef producers, without "open[ing] the door" to a myriad of other claims. Even as applied to the Food Security Act, that is not correct. Congress intended the USDA to minimize the adverse effects of the DTP not only for beef producers, but also for pork and lamb producers. 7 U.S.C. 1446 note, at 671-672. If petitioners' Tucker Act claim were upheld, those producers would doubtless file their own claims for compensation; others in the meat industry

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[4] Contrary to petitioners' insistence (Pet. 17), the requirements imposed on the Secretary to cushion the impact of the program on beef producers did not require the payment of money to petitioners, nor was the congressional direction to the Secretary to purchase 400 million pounds of red meat a "money mandating" feature of the statute in the sense used by *Grav*.

who were adversely affected by the sudden drop in beef prices would also be encouraged to press their own claims. The cumulative implied damages could be staggering.

More generally, petitioners' theory cannot easily be limited to the Food Security Act. Many statutes establishing economic programs implicitly or explicitly require government agencies to take care that industries affected by their actions do not suffer undue business losses. But it is inevitable, in the regulation of a complex economy, that such schemes will occasionally be implemented without fully satisfying all program objectives. If industries affected by those regulatory actions could predicate a right to damages from the government on as slender a basis as is proffered by petitioners, it "would necessarily * * * open the doors to similar claims by other [regulated parties] who suffer commercial damage" from the administration of a government program. *Eastport*, 372 F.2d at 1009. Any such dramatic expansion of liability should come from Congress, not from judicially implied damages remedies based on the purported misconduct of Executive Branch officials. Cf. *Office of Personnel Management* v. *Richmond*, 110 S. Ct. 2465 (1990).

d. Petitioners' final argument (Pet. 19-20) is that they are entitled to seek compensation because Congress required the Secretary to carry out the DTP program through the Commodity Credit Corporation (CCC), which is a "sue and be sued" agency. That argument has two flaws. First, petitioners did not sue the CCC under its "sue and be sued" clause, which affords jurisdiction only in district court, see 15 U.S.C. 714b(c); rather, their claim seeks compensation from the *United States* in the Claims Court.

Second, even if the United States could be "sued" as if it were the CCC, that exposure, by itself, does not provide a source of law that entitles petitioners to monetary compensation from the government; there still must be an independent basis for liability. Cf. *Loeffler* v. *Frank*, 486 U.S. 549, 554-556 (1988). Here, there is none.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Petitioners' discussion (Pet. 20-21) of whether injunctive relief was available under the Food Security Act is beside the point. Although the Claims Court stated that "Congress provided beef producers with prospective protections, rather than a retroactive monetary damages remedy," Pet. App. 11a, that reasoning is not essential to the conclusion that petitioners have not established a source of substantive law entitling them to money damages. The only issue presented here is whether 7 U.S.C. 1446 is a "money mandating" statute for purposes of Tucker Act jurisdiction. Whether that provision created enforceable rights in an injunctive context was not an issue before the Claims Court, and is not an issue before this Court.

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